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THE WISCONSIN INTEGRATION OPINION
EDITORIAL

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The Wisconsin Integration Opinion

UNWILLINGNESS TO SUPERVISE the activities of the organized bar, and a belief that integration of the bar would make illegal may of the activities carried on by voluntary bar associations, were assigned by the Supreme Court of Wisconsin as reasons for its refusal to integrate the bar of that state, as announced in a *per curiam* opinion a few weeks ago.[1]

The decision came as a stunning surprise to bar leaders who have labored tirelessly for many years to add Wisconsin to the list of integrated states, and who reasonably thought after the supreme court had expressly upheld the validity of a 1943 statute creating an integrated state bar to be organized and administered by that court,[2] that the fight for integration was over and only organizational details remained to be worked out. The court in 1943 declined to proceed with the actual setting up of the new body solely on the ground that fairness to those members of the bar then in military service required waiting for their return.

The bulk of the lawyer-soldiers having resumed their practice a year ago, President Hale of the Wisconsin Bar Association last April filed a motion requesting the court to proceed with integration of the bar. After a special hearing to establish a method of procedure, the court set September 9, 1946, as a date for a hearing and argument on a list of specific questions having to do with the general advisability of integration, validity of the statute previously upheld as valid, power of the court to require payment of dues, finality of an order of admission to the bar, and details of the proposed bar rules. The opinion disclaimed any ruling or decision on any points except the first, which it answered in the negative.

The first paragraph of the opinion following that announcement contains the following surprising declaration:

"We perceive no occasion to take testimony and report as to the advisability of integration. It could hardly result in more than obtaining the opinion of the individual members of the bar and of the public and a report upon the comparative numbers of those desiring and those opposing integration. We are informed

1. In re Integration of the Bar,—Wis.—,25 N.W. (2d) 500, decided December 18, 1946. A similar decision of the Supreme Court of Montana is reported on page 175 of this issue.
2. Ch. 315, Laws of 1943, sustained, Integration of Bar Case, 244 Wis. 8, 11 N.W. (2d) 604 (1943).

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from the briefs and arguments presented at the hearing of the motion that individual opinions are contradictory, and *it is not material which opinion predominates or how much.*[3] The responsibility for deciding the motion is ours."

The actual opinion of the bar of Wisconsin should be of interest to the reader at this point, if not to the court. Of the 3,500 licensed attorneys in that state, about 2,000, or 57 per cent, are members of the voluntary state bar association. A state-wide canvass of the entire bar was carried out in 1942 by a committee of the state association.[4] Printed forms expressing approval of the principle of integration were circulated for signatures at local bar meetings and by personal contact throughout the state. The lawyers of nine counties went on record unanimously for integration. The number of responses in other counties varied with the amount of time and energy devoted to the canvass by the county committee, but always there was an overwhelming affirmative majority. The total number of expressions was in excess of 1,200, of whom less than ten per cent were opposed. From the circumstances of the canvass it is reasonable to assume that the responses of the lawyers not contacted would have been in the same proportions, so that for every lawyer against the proposal there were more than nine in favor of it, including both members and non-members of the state association. It is apparent that hundreds of lawyers not members of the voluntary state association were willing and anxious to become supporting members of a genuine state-wide organization of the entire Wisconsin bar.

The reasons advanced by the court for its disregard of the almost unanimous demand of the Wisconsin bar for a modern and efficient organization would support equally well the imposition on it of that or any other form of organization approved by the court in the face of a 90 percent protest on the part of the bar. Other courts have paid careful and respectful attention to the attitude of the lawyers involved, and have on occasion indicated their willingness to act in accordance therewith.[5]

AUDITING OF DISBURSEMENTS

The court then took up the fiscal aspect of integration, rejected the reasoning of various decisions upholding state bar fees as an occupational license,[6] and justified their collection as implementation of the court's inherent power to control and regulate the bar as officers of the court, but pointed out that whatever the fees may be called they are moneys required to be collected by a governmental agency for a public purpose. Then, reasoned the court, since they do not go into the state treasury and—

"—are not subject to audit or to the legislative process of appropriation in which the public character of the purposes for which the moneys are used may be considered, this court must assume the responsibility of seeing that activities of the bar for which these moneys are paid are sufficiently public to warrant the use of the money for their promotion."

This responsibility, taken for granted by every other state supreme court having supervision of an integrated bar, is too great for the judges of the Wisconsin tribunal.

"The bar as integrated would be definitely subordinated to the court and under the disagreeable necessity of having its activities policed by the court, and this being true, the price of integration would be much greater than this court or any lawyer ought to be willing to pay. . ."

The state bar governing boards and the supreme courts of states like Missouri, Nebraska, Michigan and numerous others have a record of close and cordial cooperation in elevating the standards of the legal profession and promoting the administration of justice over periods of five, ten and twenty years. They do not consider it "policing," nor a "price" to pay at all.

LIMITATIONS ON BAR ACTIVITIES

The Supreme Court of Wisconsin encounters further difficulty when it attempts to survey the possible activities of an integrated bar in

3. Italics added.

4. For details see Edmund B. Shea, "Wisconsin's Successful Bar Integration Campaign," 27 J. Am. Jud. Soc. 13 (June, 1943).

5. The Supreme Court of Missouri conducted its own poll of the bar of that state prior to ordering its integration. 28 J. Am. Jud. Soc. 50, 51 (Aug., 1944). A poll of the West Virginia bar prior to integration showed a preponderance of about 8 to 1 in favor among the lawyers at home, and an actual vote of 83 to 3 among those in military service. 28 J. Am. Jud. Soc. 165, 166 (April, 1945).

6. A. C. Brydonjack v. State Bar of California, 281 P. 1018, 66 A. L. R. 1507; In re Gibson, 4 P. (2d) 645; State Bar of Oklahoma v. McGhee, 298 P. 587; Kelley v. State Bar of Oklahoma, 298 P. 623; Petition for Integration of Bar of Minnesota, 12 N. W. (2d) 513; In re Scott, 53 Nev. 24.

the light of the requirement that the funds collected for its support must be expended for a public purpose. Grievance work, it concedes, is within bounds; so is post-admission legal education, or a study of standards of admission to the bar. Many familiar bar activities, however, the court feels could not be permitted.

"It could not maintain a legislative agent. . . We doubt whether it could conduct propaganda in defense of the legal profession. We feel quite sure that *it could not seek legislative definition of the boundary lines of the legal profession*[7] so as to exclude accountants, labor agents and others from the trial of cases before commissions which do not require parties to have lawyers, and that, we understand, is one of the purposes for which the integrated bar would want to work."

The last quoted sentence is a most remarkable statement. The court's general statement is that the bar "could not use its dues for any purpose advantageous to its members that did not also further the good of the general public." We submit that very few organized bar activities fall outside of that salutary rule, and any that do not measure up had probably better be dropped in favor of others that do, integration or no integration. Surely it is not only a right but a public duty of an organization of the entire bar of a state to seek to define as carefully as possible, by legislative or whatever other authority is appropriate, the boundary lines of the legal profession;[8] and once that definition has been established, if it appears to exclude representative appearances of accountants and labor agents, then it is decidedly in the public interest for the bar to oppose such activities on the part of such persons with all the resources at its command. It will be news to the hard-working members of a thousand unauthorized practice committees, national, state and local, that their efforts are not for the good of the general public.[9]

The court is strongly influenced by the fact that the existing machinery apparently is doing a good job on admission and discipline. "There is no crisis in any important matter."

Conceding that the existence of a crisis would be a good reason for acting, it may be questioned whether non-existence of a crisis is a sufficient reason for not acting. A city's fire trucks and other paraphernalia may be in good working order, and may have been adequate to cope with all fires to date, but such facts do not stop fire departments from replacing obsolete trucks and ladders with more modern equipment whenever the superiority of the new has been demonstrated. The superiority of the disciplinary effectiveness of the integrated bar over that of the unintegrated state is generally recognized. Wisconsin deserves and needs an integrated bar for disciplinary purposes, regardless of how well its existing disciplinary machinery has been functioning.

"All these results, however," says the court, "would result from an adequately supported voluntary association."

True—if by adequately is meant unanimously, but only then if the court exercises the powers integration assigns to it in some other and equally effective way. Indeed, there would be no need for either lawyers or courts if everybody did the right thing. The court's exhortation to join the Wisconsin Bar Association will fall flat on the ears of those numerous lawyers who have demonstrated their unwillingness to

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7. Italics added.

8. The 1945 West Virginia bar act makes a definition of the practice of law one of the prerequisites to the establishment of the integrated bar, and directs the Supreme Court of Appeals to adopt such definition by rule. A 350-word definition, drafted by that court with the assistance of the Judicial Council and the executive council of the State Bar of West Virginia, has recently been published. Detroit Legal Record, November 21, 1946, page 1.

9. "The practice of law is a matter of vital interest to the public. The lawyer is primarily engaged in the protection and preservation of the liberties and property rights of the people and the administration of justice among them, which is one of the primary purposes of good government. As society has become more compact the law has necessarily become more complex, requiring increased skill in its application. The legislature in recognition of this fact has from time to time increased the pre-legal and legal attainments required for admission to the bar. . . . It is readily apparent that it would serve no useful purpose to require high standards of efficiency for members of the legal profession if those who have not attained these standards of efficiency are to be permitted to practice the arts of the profession. . . . Again, it would be useless to establish high standards of morality for members of the profession if those who are not members and therefore not bound by such canons could practice the arts of the profession. The state has a vital interest in the regulation of the practice of law for the benefit and protection of the people as a whole, and the legislation above referred to was adopted in furtherance of a wholesome public policy." Supreme Court of Texas, Hexter Title and Abstract Co. v. Grievance Committee, 179 S. W. (2d) 946 (1944).

support the voluntary association by declining its repeated solicitations, but have demonstrated their willingness to join and participate in an integrated bar by voting to petition for the establishment of one.

HONOR ROLL OF WISCONSIN BAR

The opinion concludes with a word of sympathy for the aspirations of the proponents of bar integration, acknowledging their sincerity. It might be observed in passing that the roll of the leaders of the integration campaign over the past thirty years is a roll of honor of the Wisconsin bar. Claire B. Bird, beloved dean of that bar, first proposed it in 1914, and the present campaign dates from the state bar presidency of the Honorable Carl B. Rix, distinguished president of the American Bar Association. The list of other outstanding Wisconsin lawyers and judges who have given generously of their time and energy to bring this thirty-year-old dream of the Wisconsin bar to realization is too long to be embarked upon here. Their collective judgment, backed up by their devoted efforts, has been that bar integration is both desirable and necessary. That judgment became the established policy of the state when the people's legislative representatives enacted the 1943 statute, and the court veered widely from the judicial to the legislative function when it declined, on grounds of policy, to permit the organization or operation of a body already created expressly for that purpose by a valid exercise of legislative power.

The Lawyer's Influence

Have we, members of the bench and bar, not sought to discover and to discharge our responsibilities on bases that are too functional, and too illimitable? In our efforts to induce group consciousness and to develop group responsibility have we sufficiently considered or evaluated the individual and his responsibilities?

Has not the determination of our responsibilities been by the standardized, surface-feeding formula:—

Admission to the bar is a privilege grantable by the state in the public interest and upon conditions, and when the grant ceases to be in the public interest it may be curtailed, withheld or withdrawn. *Ergo*—it is the responsibility of the lawyer to comply with the conditions of admission. There is ample evidence that this has been a traditional premise and it accounts for the repetitive summation of the responsibilities of the legal profession, *i. e.*, in the public interest to promote and maintain high moral and educational standards, keep its ranks free from unworthy members and aid in the administration of justice. To these may be added the duty to protect the granted privilege from lay encroachment—in the public interest. Its emphasis is almost necessarily on group responsibility. Even bar integration fits into this pattern.

This is all right as far as it goes, but it represents thin thinking. One must plow more deeply to reach the roots of the legal profession and the broader foundations upon which the greater responsibility of its members rests.

Few, if more than one, of the early colonial bar associations survived the rigors and individualism of frontier life.

It was not until about 1870 that a trend toward bar organization began. The American Bar Association was organized in 1878. All of the associations were of the voluntary, minority, selective type. Yet in 1835 (with that critical discernment to which a committee of the American Bar Association has recently referred)[1] DeTocqueville found that the individual members of the legal profession, spread throughout the whole country and penetrating into all classes of society, were an indispensable factor in our system of government, and that their influence therein was the most powerful existing security against the excesses of democracy. He was convinced that the lawyers formed "the most powerful, if not the only counterpoise to the democratic element." Said he:

"The profession of the law is the only aristocratic element which can be amalgamated with-

1. "Plan for a Study of Legal Profession and Legal Education in the United States."

out violence with the natural elements of democracy, and be advantageously and permanently combined with them. . . . I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people."

A hundred years later Esther Lucile Brown, author of the Russell Sage Foundation publication, *Lawyers and the Promotion of Justice* portrayed the evolution of that which DeTocqueville detected, and the validity of his prophecy. Said that author:

"To a degree not true of any other profession, lawyers serve society in diversified ways. Not only are they counselors and advocates for their clients, but members of the bench are chosen from among them. As judges they decide what the law is, and the judicial decisions rendered by them in the highest tribunals become a part of our common law. In addition to these strictly professional functions, large numbers of lawyers enter public life as state legislators and members of Congress. Much of our statutory law is proposed and nearly all of it is drafted by them. The administration of government is also extensively carried on by members of the bar. Thus, on the legal profession devolves large responsibility for the legislative and executive branches, as well as for the judicial branch of government.

"So widespread is their influence and power that the future of the United States lies, in no inconsiderable degree, in the hands of lawyers."

It cannot be gainsaid that "power in a democracy implies responsibility for its exercise." As long as our system of government prevails inevitably there will be lawyers and judges, and a need for their talents and services. Directly and indirectly they are an essential part of a government under laws adapted by the people through their representatives.

There is no indication that the legal profession in this country is at the crossroads of emergence or oblivion, or that there exists a crisis in judicial affairs. True, as is characteristic of the working of a democracy, to the extent that lawyers, judges, or other participants recognize and discharge their responsibilities, the governmental result will be affected, for better or for worse. Any crossroads or crisis as to the legal profession or the judiciary will involve government itself. The civil war was the result of a court decision, but it was government that was at stake. It is in connection with government that the greatest responsibility of the bench and bar of this country exists. Yet, have we not for one reason or another, considered the area of this responsibility as "off limits" or within the "can't helps?"

Until a very short time ago the actual or suspected inherence of a social or political aspect in a resolution or report proferred for bar association discussion or action, had the effect of lethal gas in a death chamber. Fortunately this attitude is in the course of change. The removal of such self-imposed shackles leaves the legal profession and its members face to face with their greatest responsibility. It is indeed heartening that the American Bar Association has approved the proposal of the Council of its Section of Legal Education and Admission to the Bar that a critical and objective study of the American lawyer, his weaknesses, points of strength, potentialities for service and his actual services, he made. It is estimated that the cost of the study will be $150,000 and it appears that the Carnegie Foundation of New York will join in financing it. A similar study was made by Flexner as to the medical profession, at a cost of $287,000. The approval of the lawyer-study and the range of intended inquiry are persuasive indications that the question whether the lawyer is fully meeting his responsibility exists. The rendition of substantial aid by a lay foundation is more than an implication that a problem of consequence to the public is involved.

However, in the last analysis the individual lawyer, in whatever capacity he may be acting, must recognize his responsibilities and individually discharge them. The study can be but an aid to that end. Without individual consciousness and response, group consciousness is impossible.

Sift out the causes of dissatisfaction with courts or the legal profession and you will find that they stem from the conduct of individual lawyers or judges or from situations which they individually could control or improve.

GEORGE E. BRAND.

Judges: Their Selection and Tenure

LAURANCE M. HYDE

"It is an old saying that by looking at a frog one cannot tell how far he can jump. It is likewise true, although perhaps not as fully realized, that by seeing a man's picture on a telephone pole voters cannot tell whether he possesses the essential judicial qualities."

OUR METHODS OF judicial selection and tenure have mainly resulted from two revolutions: the Revolution of 1688 against the Stuart Kings in England and our so-called Jacksonian Revolution of the eighteen thirties. The latter, while more peaceful, was no less drastic in its effect on government, particularly our state governments.

In England before Magna Charta, the will of the prince was the law of the land.[1] Thereafter, the limitations and safeguards of the great charter were effective in individual cases only to the extent that the courts would enforce them. When the judges' commissions read at the pleasure (*durante bene placito*) of the king, these great principles of liberty meant little in a case in which the king's interest was opposed to them. This was fully recognized in the long struggle for freedom against the tyranny of the Stuart kings throughout the seventeenth century. There were some outstanding instances of courageous judges, like Lord Coke, who would not let the king dictate their decisions. But the fact that they usually lost their offices, after refusing to follow the king's will, was not conducive to the establishment of an independent judiciary. Judicial independence came only after James II was driven out by the Revolution of 1688. The Settlement Act of 1701 established that the judges' commissions should thereafter read "during good behavior." (*Quamdiu se bene gesserint.*) The present high standing of the English judiciary has been the result. It has become the great bulwark of English liberties during the last two centuries, as well as an outstanding model of efficiency in the administration of justice.

The events leading to the Revolution of 1688 were fresh in the minds of the men who wrote our constitution. They had still more recent examples in the acts of colonial judges controlled by the king. They had complained in the Declaration of Independence that "he has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[2] They believed as stated in the Federalist papers that "independence of judges is equally requisite to guard the constitution and the rights of individuals."[3] Jefferson commented: "In England, it was a great point gained at the Revolution that the commissions of the judges, which had hitherto been during pleasure, should thenceforth be made *during good behavior.* A judiciary dependent on the will of the king had proved itself the most oppressive of all tools in the hands of that magistrate."[4]

At the beginning of the French Revolution Edmund Burke wrote to friends in France criticizing proposed provisions for the judicial branch of their new government, as follows: "Instead of seating your judges on a bench of independence, your object is to reduce them to blind obedience. * * * They are to be sworn to obey all the rules, orders, and instructions from the National Assembly. * * * They become complete and most dangerous instruments in the hands of the governing power, which, in the midst of a cause, or on the prospect of it may wholly change the rule of decision. * * * They know not by what law they judge, nor under what authority they act, nor by what tenure they hold."[5] It is significant and perhaps not surprising that "the Reign of Terror" followed such ideas of government, and this demonstrated that control of courts by the legislative branch can be equally as dangerous to

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This address was a part of the program at a section meeting on "The Manpower of the Courts" at the Forty-Second Annual Meeting of the American Political Science Association at Cleveland, December 28, 1946. Its author is a judge of the Supreme Court of Missouri, and was the first appointee to that court under the plan here described.

1. 3 Green, History of England (1900) Chap. 1.
2. Declaration of Independence, ninth specification.
3. Federalist No. LXXVIII.
4. Jefferson's Autobiography.
5. Reflections on The Revolution in France (1790).

liberty as executive control. It was further proof of the following statements in the Federalist: "The standard of *good behavior* for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. * * * Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."[6]

For these reasons, a judiciary selected by executive appointment, with confirmation by the Senate, and with life tenure, was established by the constitution as an independent branch of our government. This example of life tenure was either followed or preceded in the constitutional provisions of ten of the original thirteen states[7] (although judges were chosen by the legislature in some) and by eight of the eleven new ones admitted before 1830.[8] But during the next 25 years, 15 states changed to short terms filled by popular election. Every state admitted after 1846 adopted that system. Now only three states (all being among the original thirteen) retain life tenure, and only two of them have the appointive system.[9]

Why was this situation so radically changed between 1830 and 1850? Many explanations have been made. Jefferson's personal differences with Marshall and other controversies over the acts of early federal judges resulted in a change of his views and influenced others. Some of the other reasons most frequently given are:[10] the growth of the west and the desire to break the political monopoly of the more aristocratic groups in the older states; the wave of democratic fervor which swept over the world, bringing about universal suffrage throughout America, and resulting in the Revolutions of 1830 and 1848 in Europe; the recollection of many Irish immigrants of harsh prosecutions arising out of eighteenth century movements for Irish freedom as well as the earlier persecutions by English and Scotch judges, all of which were partly responsible for waves of immigration to America; the unpopularity of lawyers and the creditor classes they often represented; the unpopularity of many rules of the common law which the courts followed and which the new state legislatures believed should be superseded by statutes; the pioneer idea that any man should be able to perform any task or fill any office without special training; and the scarcity of well educated lawyers available to fill judicial positions especially in the new states. Whatever the reasons were, it is fairly obvious that the movement went too far, resulted in the impairment of judicial independence and lowered the standing of the judiciary in our state governments. James Bryce, writing in 1889 commented: "Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence."[11]

THE FACTOR OF EXPERIENCE

Other harmful effects resulted from these factors. Where tenure is secure, so that judges may be sure that judicial work will be a life career, they can have time to study and utilize the best judicial methods. However, where the turnover of personnel is frequent, as is usually true in states closely divided politically if judges are elected on party tickets, judges cannot expect to stay on the bench long enough to have much inducement to thoroughly study and perfect their work. To do the best judicial work, or even to learn the best methods for doing it, years of research and experience are required. Many judges do good work from the beginning of their service, but, as in any other work, all can learn to do better work in the hard school of experience. There has been a vast waste of judicial talent in many of our

6. Federalist No. LXXVIII.

7. Conn., Del., Md., Mass., N.Y., N.J., N.C., Pa., S.C., Va.

8. Vt., Tenn., La., Ill., Miss., Ala., Mo., Me.

9. Mass. and N.H. R.I. has life tenure with election by legislature.

10. Haynes, *Selection and Tenure of Judges*, Chap. IV.

11. Bryce, *American Commonwealth*, Chap. XLII.

states by turning men out of judicial office about as soon as they have begun to learn how to best do the job. This situation has been one of the greatest of all handicaps to progress toward better judicial methods.

It seems reasonable to believe that the great number of cases decided during the last century upon technicalities of procedure instead of upon the merits, may be partly explained by the factors described by Bryce. Men of inferior learning in substantive law have great temptation to take refuge behind procedural technicalities in their decisions. Likewise, this is a good device for reaching a result which could not be justified upon a discussion of the merits. The great mass of precedents for decisions on procedural technicalities which has accumulated in this country during the last one hundred years has long been a retarding influence on the improvement of the administration of justice. We have finally begun on a nationwide basis to relieve this situation by procedural reform with the adoption of the new federal rules now being followed in many states.

On the subject of short term tenure with elections on political tickets, a former Chairman of the Judicial Administration Section of the American Bar Association, Judge Henry T. Lummas of Massachusetts, has pointedly stated that even a politician may make a good judge if he can stop being a politician when he goes on the bench but that it is a great handicap to have a system which requires a judge to be a politician to remain a judge. The foundation of our whole law enforcement system must be respect of our people for the law and this must depend mainly upon confidence in the independence, ability and integrity of the judges who apply it. There must be no partisanship in the administration of justice and there should be none in the selection and tenure of judges.

THREE DIFFICULT PROBLEMS

Nevertheless it must be recognized that there are three difficult problems of judicial selection and tenure, namely: How to select a man who is competent to be a judge?—How to keep him on the bench if he does become a good judge?—and, How to get rid of him if he does not? The first and most difficult problem of selection may likewise be divided into three parts: To find a man with the three essential qualities of personal integrity, judicial temperament, and adequate legal training.[12] The two remaining problems of tenure, both are: To make the judge's tenure depend as much as possible upon the record he makes in service on the bench.

However, the matter of proper selective methods is most vital to the maintenance of a highly qualified judiciary. As Dean Roscoe Pound has commented: "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on."[13] Even the operation of the system of executive appointment with confirmation by the Senate in our federal government has not been completely satisfactory. Too often it has resulted in the actual selection being made by one senator or by a senator's political sponsors. Since the president must rely upon senators for support in other matters more important to the success of his administration, he is likely to give greater weight to their choice for judicial positions than to recommendations of the bar.

In recent years there has been a tendency toward improving the standards of the state judiciary, especialy to free the judges from dependence upon politicians and political parties. In several states the terms have been lengthened, particularly for appellate court judges. In others judges no longer run on party tickets. However, these remedies do not solve the three principal problems of selection and tenure. It is an old saying that by looking at a frog one cannot tell how far he can jump. It is likewise true, although perhaps not as fully realized, that by seeing a man's picture on a telephone pole voters cannot tell whether he possesses the three essential judicial qualities. Many voters have little more than this as a basis for their decisions on state-wide judicial officers or even on local judicial officers in large cities. It requires personal acquaintance to determine whether a man has the essential judicial qualities. Often, in rural districts of small population, the majority of the voters either do have such personal acquaintance with candidates for judicial office or know someone who has. This was particularly true in the past when a term of court was a great event and gathering place

12. Hall, "Selection, Tenure and Retirement of Judges," 3 J. Am. Jud. Soc. 37.

13. Haynes, *Selection and Tenure of Judges*, Introduction.

for people of rural counties and when most of the men of every community had the informative contacts of jury service. In elections on a state-wide basis, people may learn something of the personality and ability of candidates for governor or senator, who go about the state appearing before large crowds discussing their views concerning governmental policies in which the voters are intensely interested. Since judges cannot do this, voters do not expect to see state judicial candidates or to be able to have any sure source of information about them. Therefore, they do not get interested in them and either vote blindly or follow the suggestion of someone who does have an interest.

This lack of interest, because of lack of sure means of information, is the reason why attempts at completely open non-partisan judicial elections, on a state-wide basis, usually show no better results than elections on political tickets. Party labels are sometimes better than no labels at all. If voters have no means of their own for selection, necessarily, someone must make a selection for them. Since a political party must take the responsibility for failures of its candidates, party leaders will make an effort to obtain more or less intelligent selections. However, the nominating primary election has weakened their responsibility and helped the chances of the self-advertiser and the machine-made or pressure group candidate; and this is so perhaps even to a greater degree of non-partisan statewide elections. Another trouble is that the politically minded frequently consider a judicial position like any other office, as only a reward for the faithful, and are likely to overlook the necessity for other requisite qualifications. The same thing may be true even in the system of appointment by the chief executive, whether with or without the check of Senate or other confirmation.

Just as bad too is the fact that, under the party primary and election system, tenure depends even more than selection, upon issues wholly irrelevant to any judge's ability, record or qualifications. This has been illustrated by recent experience in Missouri, where, in twenty years between the first and second World Wars (1919 to 1939), only twice (1922 and 1936) was a judge of the Supreme Court of Missouri who had served a full ten-year term re-elected to another term. The ten elections during this period all turned on national party issues. One able former member of our Supreme Court said that he was elected to be a judge in 1916 because Woodrow Wilson had kept us out of war; and that he was retired from office in 1920 because he had not. Judges, the same as persons in other positions requiring special knowledge and training, should improve with experience in doing their work. Certainly, it is not conducive to obtaining the best possible judicial services for the state, to replace judges as soon as they had sufficient experience to learn how to do their work well. Moreover, even when a judge is reelected much time has been lost from judicial work by participation in long primary and general election campaigns. This is one factor that has made it difficult for many courts to keep up with their dockets.

THE A. B. A. PLAN

The necessity of improving these conditions has been given much study during the past quarter of a century, with the realization that high qualifications for our judiciary are required to make it possible for the many new problems arising from modern industrial and urban conditions to get prompt, intelligent and efficient treatment in our courts. The American Bar Association has furnished leadership in this cause. The House of Delegates of the American Bar Association, at its first meeting in January, 1937, at Columbus, Ohio, adopted a resolution designed to establish methods of judicial selection "that will be conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the state judges out of politics as nearly as may be."[14] This resolution specified two essential provisions for accomplishing this high aim:

First — Appointment by the executive "but from a list named by another agency composed in part of high judicial officers and part of other citizens, selected for the purpose, who hold no other public office."

Second—After a period of service, the appointee should "go before the people upon his record, with no opposing candidate, the people voting upon the question 'Shall Judge Blank be retained in office'"

In 1938, under the presidency of the Honorable Arthur T. Vanderbilt, and with the Honorable John J. Parker as Chairman of the Section of Judicial Administration, the whole field of

14. 62 A.B.A. Rep. 1033.

improving the administration of justice and selection and tenure of judges was surveyed and discussed at the annual meeting at Cleveland. Very extensive reports of these studies were published and are still available.[15] Steps were taken to carry on the movement for better methods of judicial selection and tenure. California had adopted certain features of the recommended plan for its appellate courts in 1934.[16] In 1940, Missouri adopted a constitutional amendment, submitted on initiative petition, which put into effect the complete plan recommended by the American Bar Association. Several other states are now considering constitutional amendments to put this plan in effect.

MISSOURI VOTERS UNDERSTOOD IT

When this new plan was proposed in Missouri almost everyone said it had no chance of adoption. Even its sponsors thought they were beginning a campaign of education which would require several submissions. To the surprise of everyone, the amendment was adopted at the 1940 election by more than 90,000 votes. Its opponents said that the people did not understand it, and obtained its resubmission by the 1941 Legislature. It was then retained by more than 180,000 votes.[17] This was considered a rather effective demonstration that the people did understand it; and also showed that the people likewise understood what some opponents of the plan wanted. Therefore, when a convention was assembled in 1943 to frame a new constitution for Missouri, this plan was reincorporated in it without change except to place more judges under it. The popularity of this nonpartisan court plan with the people of our state was an important factor in bringing about the adoption of a progressive modernized constitution in 1945.

Missouri's new constitutional provisions contain both of the essential provisions advocated by the American Bar Association. All of our appellate courts are under the new plan; but only the trial courts (circuit courts) of St. Louis and Kansas City are under it. As to all other trial courts (circuit courts) of the state, it is optional with the voters of any circuit to adopt it in a local option election if they want it.[18]

Under our plan, selection is made by the governor's appointment, but from a list of three names submitted to him by a Selection Commission. The Selection Commission, for our Appellate Courts (the Supreme Court and three Courts of Appeals), is composed of the chief justice of the Supreme Court as chairman, three lawyers elected by the bar, and three laymen appointed by the governor. The members, other than the chief justice, have six-year terms, staggered so that one term expires at the end of each year.[19] These members are not eligible to succeed themselves. The lay members are appointed by the governor, one every two years, each from a different court of appeals district. The lawyer members are elected, one every two years, by the members of the bar of the court of appeals district which they represent. The ballots for the election of lawyer members are sent out by mail by the clerk of each court of appeals, and returned to him to be canvassed by the judges or lawyers appointed by them. The Selection Commissions for the city trial courts have five members. They are, the presiding judge of the court of appeals of the district in which the city is located, as chairman, two laymen appointed by the governor, and two lawyers elected by the bar. They also have six-year terms which are staggered so that the term of each member expires in a different year. Members of these commissions are limited to one term, and no governor can appoint all of the lay members of these commissions, because our governor has a four-year term and cannot succeed himself.

The next step, after a judge has been appointed from the list submitted, is that when he has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regular term (trial courts, six years; appellate courts, twelve years). Thereafter, a judge given a full term must, at the expiration of each term, submit his declaration of desire for another term to be voted on by the people. Likewise, all judges in office

15. 63 A.B.A. Rep. 406, 517.
16. 63 A.B.A. Rep. 420; 65 A.B.A. Rep. 246.
17. For information concerning these campaigns see 8 Mo. Bar Jour. 270; 11 Mo. Bar Jour. 209; 21 J. Am. Jud. Soc. 193; 24 J. Am. Jud. Soc. 118; 26 J. Am. Jud. Soc. 142.
18. Art. V, Sec. 29, Mo. Const. 1945.
19. Rule 10 of Missouri Supreme Court fixing terms of members of commissions and regulating elections.

at the time the amendment was adopted were required to be voted on by the people to get another term. At all such elections, the judge's names are placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge ....., of the ..... court, be retained in office? Yes. No." Voting is by scratching one answer and leaving the other. Thus the judge has no opponent, and runs against no political party, or national political policy, but only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect that he would receive a favorable vote. Certainly, the voters may, if they desire, dispense with the services of a judge whom they believe has proven himself dispensable. They have already done so in one instance in an election under this plan.[20]

No one should claim that this new method is fool-proof or that it will operate automatically to select good judges. Like all institutions of democracy, it will require eternal vigilance to prevent its perversion and to make it work properly. One can build the finest automobile and put it in the best possible mechanical condition, but the best machine will not have any more sense than its driver has. Likewise, the best governmental methods require public interest and intelligence to make them function properly. This plan especially, requires a high degree of unselfishness and devotion to duty, on the part of lawyers, to make it work as well as its sponsors hope and believe it should. Members of the bar are solely responsible for the choice of half of the members who are elected or appointed to the selection commissions. The members they elect, together with the chairman, make a majority of lawyers on each commission. Lawyers can also have much influence in the appointment of other members and in other phases of selection. They have the best opportunity to know whether prospective nominees have the essential judicial qualities. Thus members of the bar can have the kind of judges they want but it will require sacrifice of some time and effort on their part to see that their highest ideals are properly represented by the members of the selection commissions.

The bar likewise must give the public information concerning the record and qualifications of judges whenever a vote is to be taken on their retention. This can best be done by first taking a poll of the bar on this question. Then if the result is favorable, the organized bar, and not the judge, should conduct the campaign for retention and inform the public of the record of the judge involved. Also if the vote of the bar is unfavorable the organized bar should see that the public is informed of that result and given the reasons for it. Thus an independent and courageous bar and an enlightened public are both necessary to the complete success of this plan.

COMBINES THE BEST OF BOTH

It is submitted that this plan utilizes the best features of both the appointive and elective systems, but provides safeguards lacking in either. It is more democratic than the old appointive system because it gives a better opportunity for consideration of the views of the people in selection and really amounts to an executive appointment with confirmation by the vote of all the people rather than only that of one house of the Legislature. Likewise, the people have the opportunity at regular intervals to decide the question of further service. Thus the people also apply the standard of good behavior. The provision for confirmation by the entire electorate is in itself an excellent preventative of poor appointments; and the further provision that appointments must be from a previously selected list removes the opportunity to appoint personal or political favorites of either the governor or senators. The selected list is made by a commission which has no other function and upon which both the bench and bar are represented, with representation as well of the viewpoint of those who are not lawyers. The members, other than the chairman, can hold no other office nor any official position in a political party. Thus, this commission is well adapted to receive and impartially consider both the views of the public and the appraisal of the legal profession as to the ability of lawyers under consideration for selection. Furthermore, the fact that at regular periods, after original confirmation by the electorate, the peo-

20. For an account of the operation of this plan in Missouri see Peltason, *The Missouri Plan for the Selection of Judges* (1945) Vol. 20, No. 2, The University of Missouri Studies; 23 Nebraska Law Review 177; 27 Jour. Am. Jud. Soc. 166.

ple may retire a judge, by a majority vote against his further retention in office, is a great incentive to all judges at all times to make a good record; and provides an easier way than impeachment to terminate the service of one who does not. Moreover, since tenure depends solely upon the test of satisfactory service, no campaigning is required and no time is lost from judicial work in election years. Judges know that their tenure is secure, if they do good work, and may count on making the judiciary their life career, with practically the same assurance as under the Federal "good behavior" standard. Therefore, under this plan, our states should be better able to attain the ideal of the founding fathers to establish an able, independent judiciary which will guard the Constitution and impartially preserve the rights of all citizens.

World Peace and the Lawyer

JOHN F. SCHMIDT

"Peace is not simply the absence of war, but the presence of justice."

NO SINGLE PROFESSIONAL GROUP is charged with the responsibility for world peace. And yet, there is probably no other professional group so well trained for the job of bringing peace to the world as are the lawyers.

Peace is not simply the absence of war, but the presence of justice. The distinction is of great importance. When we think of peace in terms of justice, rather than merely as the absence of war, we are adopting a constructive approach to the problem. We can readily understand that peace is not merely the absence of war when we consider conditions inside Germany before the outbreak of World War II. There was order in Hitler's Germany, but it was the order of oppression. Life under those circumstances, with the constant pressure to maintain the oppression, can scarcely be considered peaceful. That the desire to throw off Hitler's tyranny was not wholly lacking is evident from the elaborate controls the Nazis exercised to prevent just that.

During the war there was, even in the occupied countries, a considerable measure of order, and generally an "absence of war" except for infrequent air raids. But none of us would call that *peace*. That sort of "peace" is worse than the peace of the cemetery; it is the "peace" of slavery.

It is only in a society that keeps the avenues of justice open to all, that genuine peace is possible. In such a society, there will be no large groups of people straining to revolt. In such a society, the only people who will incline to violence will be the mentally deficient and the very small percentage of antisocial individuals—the criminal class.

When we think of *peace* in terms of *justice*, we see that it is sometimes necessary to fight for peace. I regard this point as fundamental. In reading the matter in print today on peace, and in listening to radio talks on the subject, I get the impression that we are often confused as to the objectives of our national conduct as regards the rest of the world. From what I read and from what I hear, it seems that we sometimes think it is the sole object of our national conduct to avoid war—especially, it is said, must we avoid the all-out atomic World War III. Now, granting that an all-out atomic war would be terrible beyond imagination, let us review a little of our history: we could have avoided war in 1776; we could have avoided war in 1861, in 1917, 1941. But to avoid these wars, we would have had to abandon our great principle that "all men are created equal." In short, we would have had to avoid war by accepting injustice. Each time we chose to fight for justice, for our great principle, even though the choice meant terrible wars.

Considering the record, it seems likely to me that the people of the United States will fight again for justice when and if necessary, regardless of the odds and regardless of the terrors promised by the new weapons, for those who refuse to fight for justice soon lose free-

Mr. Schmidt is a member of the Detroit bar. This article in substance was delivered in an address before the international legal fraternity of Phi Delta Delta in Washington, March 13, 1946.

dom—and it is in the American grain to value freedom above life itself.

For a long time the war-sick world tried desperately to avoid World War II. The result was the appeasement era, which completed Hitler's contempt for democracy. "Peace in our time", the slogan of appeasement, was a misnomer, because what the people were doing was merely avoiding war. To postpone war for a year, they had to turn their backs on injustice in Central Europe. When it became obvious that the mere desire to avoid war could result in nothing but triumph for dictatorship, the free people adopted a fighting slogan, "It is better to die on your feet than to live on your knees." There was no appeasement in that.

Human rights are always more important than avoiding war. Our own history proves it, although sometimes it requires a disaster like Pearl Harbor to bring us to our senses—to the realization that human rights are worth fighting for.

THE WILL TO PEACE

Now peace—the presence of justice—is attainable only when there is a *will* to peace *and* means for giving effective expression to that will. The plain people of the world have desired peace for the last ten years, but in spite of that will to peace, we have had war because, in some places, the will to peace could not be made effective. In those countries with reasonably democratic governments (such as the United States, England, France, the Scandinavian countries), the will to peace has long had its expression in the various forms of representative government in operation there, and in freedom of speech and of the press. The reluctance of the democratic nations to wage war culminated in the infamous Munich Pact. But the will to peace of the German, Italian and Japanese people had no means of expression. Rather, the governments of Germany, Italy, and Japan exercised complete control over internal communications and information sources, for the dual purpose of preventing any expression of the popular will to peace and for supplanting that will with a will to war by poisoning the minds of the people with lies about the activities of neighboring nations. The stifling of the will to peace was made possible by the dangerous system of absolute control of government from above, as opposed to government responsive to the people, as we and a few others know it.

Even in a society in which the majority of men are peacefully inclined, law and order are inseparable from government. This principle is the one that is involved when the pessimist says we'll always have wars, "human nature being what it is." People who make such statements are blind to the fact that wars do cease with the establishment of government under which conflicts can be settled by law. Government is the answer to the imperfections in human nature. These imperfections create, or are back of, conflicting interests. Unless there be certain rules for solving the problems arising out of the conflicting interests, *and* machinery for enforcing the rules, violence will result. Internationally, this violence is war. Government provides both the rules and the enforcement machinery.

This principle is what Alexander Hamilton had in mind when he wrote, "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint",[1] and "if men were angels, no government would be necessary."[2]

DEMOCRATIC WORLD GOVERNMENT

These, then, are the fundamental principles:

1. For the most part, people are more interested in justice than in avoiding war; in fact, people will go to war to establish justice.
2. Peace is not possible unless there are both a will to peace and means of expressing that will.
3. Law and order are impossible without government—authority applied directly to individuals.

These principles suggest that the *only* way to get world peace is through democratic world government—what Lincoln would doubtless have called world government of the people, by the people, for the people.

It is perfectly obvious that this runs headlong into the hard fact that the majority of people the world over have not had experience with self-government, and could not, for many years, be expected to take part in international self-government even if their political heads of-state were disposed to give them a chance to do so.

1. The Federalist No. 15.
2. The Federalist No. 51. Prof. Edward Mead Earle, editor of the Modern Library edition, credits Hamilton or Madison.

Is the outlook therefore hopeless? I think not. We need democratic world government if we are to have world peace. But we do not have world government. What do we have, actually? First, we have on the one hand a few nations, comprising a minority of the world's population, which have had long-standing experience with self-government at home and could be expected to make international self-government work; and on the other hand many nations, making up most of the world's population, which have had substantially no experience with self-government at home and could not be expected to make international self-government work. Then we have an overall, nearly universal league of nations, the United Nations. These are the materials with which we must work. How can we use them to build toward world government and world peace?

The most practical answer that suggests itself is that we accept the United Nations league as the *maximum amount of agreement among dictatorships and democracies*, but that, within that League, we organize the democracies into a genuine world federal union of, by, and for the people. The only qualifications for membership in the Union should be a reasonable measure of self-government domestically, which must necessarily include a very considerable recognition of and respect for freedom of speech and assembly, freedom of the press, and freedom of religion. The Union would be increased by the addition of new member nations, as they meet these qualifications, until the Union took in all the world and the league disappeared.

The proposal for a democratic union within a universal league appears to have been first popularized—and first made, to my knowledge—in *Union Now*,[3] a memorable book by Clarence K. Streit, long the New York Times correspondent assigned to cover the Geneva League of Nations. Mr. Streit suggests that a world union be *started* with a nucleus of democratic peoples such as Australia, Belgium, Canada, France, Ireland, Netherlands, New Zealand, the Scandinavian countries, Switzerland, the Union of South Africa, the United Kingdom, and the United States. The people of these democracies[4] would unite under a federal constitution for the government of their common affairs. The union would have the three branches common to all governments: the legislative, consisting of a house and a senate; the executive, consisting of a five-man executive board instead of concentrating all the prestige of so important a job in one man as president; and an independent judiciary comprising a supreme court and such inferior courts as would be required.

No extended review of *Union Now* will be attempted here, because there is no substitute for the book itself. Lawyers must not imagine that, because Mr. Streit is not himself a lawyer, his book can be of no value to a lawyer. So eminent a jurist as the Honorable Owen J. Roberts, presiding over a testimonial dinner in Mr. Streit's honor, commended him for "a work that I think has been the greatest educational movement that has occurred in America in my adult life."

THE LAWYER'S PART

Where do we, as lawyers, fit into the picture? The legal profession was well represented at our own Constitutional Convention at Philadelphia in 1787. Over three-fifths[5] of the fifty-five delegates who met there were lawyers, of whom almost a third had been or then were judges. Unfortunately, this record of our profession is marred by the fact that more than a third of the lawyers (including the judges) did not sign the Constitution when the Convention had finished.[6] Among the bitter oppo-

3. Harper & Brothers, New York. The unabridged and concise editions are now out of print. A pocket edition (substantially the same as the concise edition) may be had for 35c from Federal Union, Inc., 700 Ninth St., N. W., Washington 1, D. C.

4. "*Democracy.* That form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, as distinguished from a monarchy, aristocracy, or oligarchy. According to the theory of a pure democracy, every citizen should participate directly in the business of governing, and the legislative assembly should comprise the whole people. But the ultimate lodgment of the sovereignty being the distinguishing feature, the introduction of the representative system does not remove a government from this type. However, a government of the latter kind is sometimes specifically described as a 'representative democracy'." Black's Law Dictionary, 3d ed.

5. This figure is based on character sketches of Major William Pierce (Georgia), The Columbia Encyclopaedia, Encyclopaedia Britannica, and Dictionary of American Biography. Major Pierce's notes are to be found in "Formation of the Union," H. Doc. No. 398, 69th Congress, 1st Session, p. 96-108.

6. Not all failures to sign the Constitution indicate opposition to that document. For example, Caleb Strong, delegate from Massachusetts, was called from the Convention by family illness; he supported the Constitution at the ratification convention in his state. Judge Ellsworth (Connecticut)also appears to have been absent on the day of signing, but he too supported the Constitution later.

nents of a national government, during the Convention and afterwards during the ratification storms, were John Lansing and Judge Robert Yates of New York, and Attorney General Luther Martin of Maryland. The opposition of these men to effective national government assumed almost the proportions of a conspiracy.

On the brighter side of the picture, for the lawyers, is the brilliant support for ratification of the Constitution made by John Marshall in Virginia, and John Jay and Alexander Hamilton in New York. Hamilton and Jay were two eloquent lawyers who collaborated with James Madison in producing *The Federalist* papers, which have since been universally recognized as one of the great classics in political science. James Wilson was a great Pennsylvania jurist who made his arguments felt throughout the 13 States in the ratification period. Wilson and Hamilton were also, in the federal convention, consistent and effective advocates of a strong national government.

The opposition—the minority—in the big political issues of United States history makes for an interesting study. Opinions which many of us take for granted as having been right were hotly contested in their day. There was considerable opposition, spearheaded by the Tories, to the Independence Movement in 1776. Many people did not wish to offend George the Third and would have been willing to foresake human liberties for the sake of "business as usual." It took genuine leadership, including the powerful pen of Tom Paine, to sell the people on liberty, but the idea caught on, and today we are likely to take for granted the declaration that "all men are created equal."

The subsequent opposition to a genuine union of free people in the new federal constitution was tremendous. I suspect that not one U. S. citizen in a hundred has any notion of the strength of that opposition. I happen to have made a special study of it, particularly in the newspapers of the period, and the opposition arguments are appalling. The opponents of *national* government then used exactly the same arguments as are used today by those who oppose *world* government, or a democratic nuclear world government now.

The next great crisis in our history came again on the issue of freedom, when Lincoln literally gave his life blood to underscore the declaration that "all men are created equal". The "Copperheads" and "Know-Nothings" of his day were opposed to any stand for human freedom. They wished to appease, not offend the slave-holders, who were among the petty dictators of that time.

In World Wars I and II we had the same kind of opposition to the fight for freedom. The British "Cliveden Set", the "America First" crowd, the appeasers all over the world, were prepared, like Esau, to sacrifice their birthright of freedom for a mess of pottage: "business as usual."

Now we find ourselves on the winning side in two world wars. What are we doing with that advantage? Are we strengthening human liberty? We are not doing nearly enough, officially, for liberty. In the face of the historical *fact* that no league has ever been satisfactory for any material length of time, we are officially trying to "make" another league "work", but without taking the most effective step to strengthen liberty where it now exists or to check the further spread of autocracy.

Officially, we look like a sorry lot. Unofficially, however, there seems to be some cause for optimism. A leading jurist, the Honorable Owen J. Roberts, has repeatedly urged that we lead the way by uniting with some of the other democracies in a federal union of free men. In a speech[7] before the American Society of International Law, the Justice urged the formation of a democratic international federal union, and appealed to the lawyers' "high duty to enter the forum of public opinion and make your influence felt."

Of course there is or will be opposition to U. S. participation in world government. Already it is claimed that supra-national government cannot be achieved. Others warn against trying to unite the free people of the world, lest a union of the free offend today's dictators, just as they once encouraged the disunion of the democracies lest their union should "antagonize Hitler and precipitate war." All of

7. This speech, as well as a few general comments, was read into the Congressional Record on May 4, 1943, by Senator (then Representative) J. W. Fulbright. Reprints are available free from Federal Union, Inc., 700 Ninth St., N.W., Washington 1, D.C., a non-profit, membership, educational organization existing for the purpose of promoting the understanding of the principles of democratic government along federal lines, as applied internationally. At the 1945 Convention, it was decided to publish a new periodical, *Freedom and Union*, edited by Mr. Streit, the first issue of which appeared in October, 1946.

these objections follow a familiar pattern. We have seen every one of them parade across the stage of history, not once but many times.

I have already quoted the statement in our Declaration of Independence that "all men are created equal". We can now with profit recall another passage from it: "And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

Remember, the men who signed the Declaration were not the misfits and malcontents of society. They were the leaders of their time. When they pledged their fortunes, they pledged considerable wealth. Their sacred honor included the best reputations in the Colonies. And when they pledged their lives, they were in deadly earnest, for they knew that failure meant death.

Are we today prepared to do even a fraction as much for human freedom as they did? Are we prepared to follow the suggestion of Mr. Justice Roberts to "enter the forum of public opinion" in support of union of the free? Clarence Streit, Owen J. Roberts and other lawyers have marked out the way. Are we strong enough to follow? My answer is an emphatic affirmative. I hope yours will be the same.

A State Bar Public Relations Program

ALBERT E. BLASHFIELD

"This Committee considers the only sound concept of a public relations program to be a method by which the organized bar can consciously attempt to fulfill its social responsibilities, and so to secure for the members of the bar the public recognition and approval necessary for success."

Early this year the Board of Commissioners directed this Committee to make a study of the activities of the State Bar, and to report with recommendations as to ways in which the activities may be enlarged and improved, the approximate cost thereof, and ways and means of accomplishment.

Since the State Bar in connection with its present activities is already extended beyond its resources, the Committee concluded at the outset that it is idle to talk about further enlargement and improvement unless more revenues are available, and that such additional revenues should come from an increase in the annual dues for active members. The remainder of the time has been spent studying the wisest expenditure of any such additional revenues from the standpoint of public relations.

The Committee found that in the latter study it had three responsibilities: (1) to be reasonably sure that it had the proper concept of the fundamental principles involved in the public relations of an institution such as the State Bar; (2) to appraise fairly and frankly the functioning of the State Bar for the purpose of determining whether it needs strengthening in any important particular; and (3) to make specific suggestions for improvements, of as practical a nature as possible, where any serious weaknesses should be found.

The Board of Commissioners very kindly granted the request that each member of the Committee be supplied with certain authoritative study material recently published under the

Mr. Blashfield drafted this report for the Committee on Public Relations of the State Bar of Michigan, of which he was chairman. Other members of the committee were Paul Franseth, William N. Gall, Gerald Kane, Carl C. Matheny, Henry A. Montgomery, Patrick S. Nertney and Louis Tendler, all of Detroit, Francis J. George, Flint, J. Joseph Herbert, Manistique, William F. Knapp, Alpena, Emil E. Storkan, Battle Creek, Arthur R. Stratton, Kalamazoo, and Gerald E. White, Grand Rapids. Mr. Blashfield is a member of the Ann Arbor bar, and former executive secretary of the State Bar of Michigan. The report and recommendations were adopted at the 1946 annual meeting of the State Bar of Michigan without a dissenting vote.

sponsorship of the American Council on Public Relations. This material has been of great assistance to the Committee in formulating a sound concept of what a proper public relations program for the organized bar of this state should include.

DEFINING THE TASK

We recognize, of course, that the task is certainly not to be thought of in terms of a set of procedures calculated to strengthen the position and prestige of the legal profession at the expense of any other business or professional group. Any program so conceived and carried out is surely doomed, because it is too likely to make enemies of the very individuals and groups we may desire most to have as our friends.

Moreover, the task is not merely the adoption and putting into effect of a campaign of publicity and propaganda. Publicity and propaganda have their place, it is true, but it is a place of incidental importance. More than a few so-called public relations programs have been dismal failures, and actually have done more harm than good, because too much emphasis was placed on publicity and propaganda.

Furthermore, a public relations program should not be regarded as a sort of orphan appendage to the other activities of the organized bar. Any program of this nature should be an integral part of all of the activities of the organized bar, and should be a base of operations from which to develop the public acceptance and friendship necessary to forestall trouble, or to successfully meet trouble if it comes.

This Committee considers the only sound concept of a public relations program to be a method by which the organized bar can consciously attempt to fulfill its social responsibilities, and so to secure for the members of the bar the public recognition, and approval necessary for success.

Inherent in this concept is the basic principle of reciprocity which requires us individually, and as an organization, to deal with the public as we wish to be dealt with. Any apparent disposition on the part of the public to be critical of lawyers must, we think, be frankly and freely recognized by the legal profession as evidence that lawyers somehow have failed first to do unto others the things that they wish others would do unto them.

We have it on good authority that "the Golden Rule is the key to all deep understanding of human reactions. It is therefore the foundation of all good public relations. Whether fully recognized or not, it is the basis of all successful efforts to improve the public relations of any business, any educational institution, department of government, or economic or social organization."

The public relations of any institution that survives are never wholly satisfactory or unsatisfactory. The institution of the bar has survived for centuries, despite almost continuous criticism, and even ridicule. This is evidence that the legal profession by its very nature performs services for the public that are at least necessary, and perhaps indispensable, to the successful operation of an organized democratic society. It is evidence, therefore, of the seriousness and importance of our social responsibilities.

All that can be accomplished by any conscious effort to improve the relations between the legal profession and the public is to make more friends and fewer enemies,—to convert more people who are neutral into loyal friends, and perhaps even active supporters. If the organized bar is to make any further progress for its members in that direction, it will be required to continue increasingly to exert itself in a direction widely considered good, and to impress itself and its accomplishments upon the public mind with increasing force.

The legal profession generally can discharge its social responsibilities, and impress its accomplishments upon the mind of the public mot effectively, through the instrumentality of the organized bar. When we reach the point where the public accepts the fact that we are discharging our social responsibility to the best of our ability, capacity, and resources, the results of public approval will inure to the benefit of each and every member of the legal profession.

GOOD PROGRESS THUS FAR

Evidence of the soundness of this concept of a proper public relations program for the legal profession is the fact that during the first decade of its existence, the State Bar of Michigan is well on the road to becoming one of the most powerful forces for public good in this state. This progress has been due entirely to the high quality of its leadership, the un-

selfish devotion to the work of the institution by those who serve on the various committees and the fine cooperation of the vast majority of the individual members of the profession.

Substantial progress has been made in the improvement of relations between the legal profession and the public in this state. The bar has the respect of state and local governments. It has the support of our courts. Fewer complaints of professional misconduct are being lodged against individual attorneys, and fewer actions of a disciplinary nature have been necessary. The organized bar increasingly is being consulted by governmental agencies and other groups on many problems involving the administration of justice. All of these accomplishments, and many more, are matters of record in the history of the Association. We submit that there are very few lawyers in this state who would like to see the institution of the integrated bar abolished, and the profession returned to its previous unorganized status.

But this measure of accomplishment ought not to blind our frank recognition of the existence of certain practicalities that still confront us. For example: (1) In too many quarters it is still considered popular to criticize and even ridicule members of the legal profession, and we are not yet able to do very much about it. (2) Too many meritorious complaints of professional misconduct are made against individual attorneys, and far too many instances of such misconduct are brought to light publicly before the State Bar has any opportunity to deal with them first. We do surprisingly well with the machinery we have, but it must be obvious to many of us that our machinery for handling such matters ourselves is still inadequate. (3) Much too frequently committees of the State Bar have been impeded in the performance of tasks that the public and the profession has the right to expect them to perform simply by the lack of adequate facilities and financial resources. (4) The Bar Journal, as the official publication of the State Bar, is still inadequate in several important particulars, and its cost nevertheless, continues to exceed the annually increased budgetary allowance appropriated for its publication. As the official publication of the State Bar, the Journal is an element of primary importance in any public relations program undertaken by the State Bar.

By way of appraisal, therefore, it seems to this committee that the State Bar probably has reached a point in its progress somewhere midway between its status prior to integration and the point where it can be said to be fulfilling substantially all of its social responsibilities. We hope that there are not too many lawyers in this state who are satisfied with a battle that is half won. An expansion of the efforts and resources of the State Bar is clearly indicated.

Whether we like it, or not, we are living in a period when trade associations, labor unions, and other business and professional groups are maintaining and operating efficient and well-financed organizations, with membership dues generally far in excess of annual fees paid by lawyers. It needs no argument to show that this situation places the organized bar at a distinct disadvantage, especially when such organizations attempt, as some do, to strengthen their own position and prestige at the expense of the legal profession, or adopt courses of action abhorrent to the legal profession.

We do not wish to be understood as claiming that the State Bar should in any way be cheapened, developed into a propaganda or pressure group, or brought into the class of self-seeking organizations concerned only with advancing the interests of their members. We plead only for financial resources that will enable the State Bar to carry on more effectively its work of public benefit and concern,—of which there is ample to occupy it for many years to come; and when the occasion requires, to defend lawyers successfully against those who are still disposed to ridicule and criticize unjustifiably, and who seek to strengthen their own position and prestige at our expense.

SOME CONCRETE PROPOSALS

At this point the Committee recognizes that the members of the bar of this state are entitled to know its views upon the question of how the additional revenues resulting from an increase in the annual dues should be spent. The Committee has endeavored to be practical, and is prepared to suggest at least the following improvements considered most desirable from the standpoint of public relations.

1. [Here the report offered a number of suggestions, more or less technical, for improvement of the already excellent *Michigan State Bar Journal.*]

2. The State Bar does not have adequate facilities for the investigation of complaints of unauthorized practice of law and professional misconduct. No phase of the work of the organized bar is affected with greater public and professional interest than this. We will not progress very far toward making it unpopular to criticize and ridicule the legal profession until we improve still more the machinery by which we can put our own house in order and keep it there, and also improve the machinery by which the public can be more effectively safeguarded against the bungling of laymen and lay-agencies who attempt to practice law.

A much better job could be done by the grievance committees and the Unauthorized Practice Committee if they had available the services of a trained employee whose sole duty would be to investigate every complaint of professional misconduct and unauthorized practice of law that has any semblance of merit, no matter where in the state it occurs, and to present the evidence thus obtained to the proper grievance committee, or to the courts, as the case may be. Needless to say, such an employee should be an attorney. It is not feasible to expect the executive secretary to do this work in addition to his other manifold duties. Not only does he not have the time, but the nature of his work is such that it should not be devoted too much to that sort of thing. Moreover, it is impractical to expect busy lawyers voluntarily to take the time necessary to do the required leg work in connection with such investigations.

3. The history of the organized bar is replete with instances where important committee activities have been impeded through lack of proper facilities and adequate funds for research. In making this observation, this committee is not being critical; it is merely stating a fact. Thus far the committees of the State Bar have done a remarkable job considering the relatively meager facilities and finances that have been available to them. This Committee merely desires to suggest how much better the job could be done if the general committees of the State Bar had available at least the following:

(a) Trained research facilities to perform the detail work in connection with the committee's studies. Many of us have been frequently chagrined in the past to see other agencies and organizations, with proper research facilities available to them, get the jump on the lawyers by making studies and proposals upon subjects concerning which the legal profession itself should have taken the lead. The legal profession must at all costs capture and retain the leadership in all matters having to do with jurisprudence and the administration of justice, and also be able to oppose successfully any proposals made by other groups which do not meet with our approval.

(b) The committees should have available to them better facilities for the circulation of material for study among committee members. This is highly necessary and important if the committee members are to maintain and improve the high quality of their studies and recommendations.

(c) There should be better facilities available to the committees and to the State Bar for the dissemination of information concerning committee recommendations to the public, the courts, and other governmental agencies affected or concerned with such recommendations.

(d) Funds should be available for the payment of the traveling expenses of committee members in the performance of their tasks. We venture to say that the State Bar would not feel so apologetic about asking committee members to participate in committee work, and committee members would not be so reluctant to do so, if they could be reimbursed at least for their actual out-of-pocket traveling expenses, particularly in those cases where long distances are traveled for the purpose of attending meetings.

The organized bar should be able to say not only that it recommends a certain course of action but also to support those recommendations by evidence of careful study and research, and finally to be able to state that the studies and research upon which such recommendations are based originated with the organized bar, and not with some other group or agency. No space need be taken to enumerate the multitude of problems pertaining to the administration of justice that need attention now. We have only to mention a few, such as justice courts, probate courts, traffic courts, and state administrative agencies and procedure. All of these problems require careful and exhaustive study even though some work has already been done in connection with some of them by committees of the State Bar and other organizations.

4. The State Bar of Michigan is not equipped financially to carry on adequately that phase of public relations work which has to do with impressing its activities on the public mind.

This committee has long been of the opinion that the State Bar of Michigan should at least retain competent and qualified public relations counsel to guide and assist us in the employment of methods and techniques for a proper public relations program. . . .

We should equip ourselves financially to launch and maintain at least an adequate number of the projects that will be recommended by the public relations counsel, such as propaganda material, expertly handled press releases, and the like. All of these in addition to the Bar Journal are media for self-expression. Self-expression, projected in the right direction, clear enough, forceful enough and continuous enough to be effectual, is equally as important as doing a good job of discharging our social responsibilities in the first instance.

[Here the report discussed the proposal "as a modest beginning in such projects," to establish an annual high school essay contest under State Bar sponsorship.]

MORE MONEY WILL BE NEEDED

What has been suggested is regarded by this committee as the very minimum of what ought to be done to increase the usefulness and benefit of the organized bar to the public and to the profession. No part of it can be done on the present financial resources of the State Bar of Michigan. More money will be needed,—twice as much as we now have available from our present annual fee of $5.00.

We have no right to expect any other group to furnish the additional money, and we should not even think of asking them to do so. We must pay our own way if we are to preserve our independence.

The committee believes that we can do substantially all of the things suggested if each active member should pay an annual fee of $10.00. The committee respectfully submits that the $10.00 per year can be paid without hardship on the part of any active member just as easily as the $5.00 now paid.

The committee subscribes whole-heartedly to the following observations, which appeared in the April, 1946, issue of the JOURNAL OF THE AMERICAN JUDICATURE SOCIETY:

"It is time that the lawyers of America faced squarely the issue of whether or not they are sincere enough in their ideals of public and professional service to provide the means and organization to translate those dreams into constructive action. If they are satisfied with the part-time efforts of volunteers who must sacrifice personal time and interests to carry forward the work of the organized bar, then they should rest content with what they have and not complain because bar associations, already extended far beyond their resources, are not doing more than they are at present."

To the enlightened scholar—and every true lawyer is a legal scholar—the rules with which he daily deals are the elements of a living whole, each touched by the light of romance and adventure. As the water in this glass I hold has been a part of every ocean, laved the shore of every continent, coursed in the currents of the Amazon, the Ganges and China's Yellow River, fallen as snow upon the Himalayas, the Andes and the Alps, perhaps kissed the Ark itself or flowed by Babylon when the exiles sat down by its rivers and wept, or been drawn from Jacob's well, aye, mayhap quenched the thirst of Jesus, so these principles of law with which we work have been touched by the history of every people, been influenced by every struggle of the past, and are the products of the ages. Our faith is that the great system of the law will continue slowly to develop until it approximates at last the ideal of perfect justice.—*Merrill E. Otis*

Constitutional Provisions Affecting Minor Courts

EDSON R. SUNDERLAND

IN ANY STATE in which justices of the peace are found, and most states fall into that class, any substantial reorganization of the inferior court system will almost necessarily affect the jurisdiction now exercised by those officers. So far as that jurisdiction is protected by the constitution of the state it is, of course, beyond the reach of any legislative measures of reform. The first question, therefore, which presents itself is the extent of the judicial powers conferred on justices of the peace by the constitution. The answer to this question will determine whether a comprehensive and satisfactory system of inferior courts can be substituted for justices of the peace by act of the legislature, or whether all efforts to that end must await the adoption of a constitutional amendment or a revision of the constitution.

Almost every state constitution in this country contains some reference to justices of the peace. These provisions are of the utmost diversity both as to the subject matter covered and the language employed. Some contain direct grants of judicial power to justices of the peace,[1] while others do not.[2] Some prescribe the number of justices who shall be elected or appointed,[3] some prescribe their terms of office[4] or qualifications,[5] some fix their jurisdiction or impose restrictions of various kinds upon it,[6] and these various provisions are frequently found even in those constitutions which do not expressly vest any judicial power in justices of the peace as well as in those which do so vest it. In some constitutions both civil and criminal jurisdiction are subject to the determination of the legislature, in others only civil jurisdiction, in still others only criminal, and these provisions sometimes are, and sometimes are not, subject to general restrictions limiting legislative action. The jurisdiction granted is sometimes exclusive, and sometimes concurrent with that of certain named courts. In some states the constitution contains hardly more than a mere mention of the name "justices of the peace,"[7] from which questions at once arise as to how far this carries implications binding on the legislature. It is also very common for constitutions to vest judicial power in a list of designated courts, which may or

The author is secretary of the Judicial Council of Michigan and professor emeritus of law in the University of Michigan law school. This article is the fifth and last of a series adapted from a *Study of Justices of the Peace and Other Minor Courts*, published a year ago by the Judicial Council of Michigan as part of its Fifteenth Annual Report. See "Qualifications and Compensation of Minor Court Judges," 29 J. Am. Jud. Soc. 111 (Dec., 1945); "Territorial Jurisdiction of Minor Courts," 29 J. Am. Jud. Soc. 147 (Feb., 1946); "Subject-Matter Jurisdiction of Minor Courts," 29 J. Am. Jud. Soc. 175 (April, 1946); and "Minor Court Officers and Records and the Handling of Traffic Cases," 30 J. Am. Jud. Soc. 52 (Aug., 1946).

1. Nevada: "The judicial power of this state shall be vested in a supreme court, district courts, and in justices of the peace." To the same effect, with varying language, are the constitutions of Arizona, Delaware, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

2. States in which a grant of judicial power to specified courts does not include justices of the peace: Alabama, California, Colorado, Indiana, Iowa, Maine, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina and Virginia.

3. Prescribing the number of justices: Alabama, Colorado, Florida, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, New Jersey, Tennessee and Texas.

Number of justices specifically left to the legislature: Arizona, Connecticut, Delaware, Idaho, Illinois, Indiana, Maryland, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Utah, Virginia, Washington, West Virginia and Wyoming.

4. Terms of office prescribed: Colorado (two years), Kansas (two years), Massachusetts (seven years), Maine (seven years), Mississippi, Montana (two years), New Jersey and Pennsylvania (six years).

5. Qualifications of justices prescribed: Kentucky, Louisiana and Minnesota.

6. Jurisdiction set by the constitution: Alabama (civil), Florida (civil), Georgia (civil), Iowa (civil), Louisiana, Mississippi and Wyoming.

Jurisdiction established by constitution but may be extended by law: North Carolina, Texas, West Virginia.

Jurisdiction left to legislature subject to certain constitutional restrictions: Idaho, Illinois, Minnesota, Montana, Nebraska, Nevada, New Mexico (civil), Oklahoma, Oregon, South Carolina, South Dakota, Washington, Arizona and Colorado.

Jurisdiction left entirely to legislature: Alabama (crim.), California, Connecticut, Delaware (crim.), Florida (crim.), Indiana, Iowa (crim.), Kansas, Maryland, Michigan, Missouri, New York, North Dakota (crim.), Rhode Island, Utah, Virginia and Wisconsin.

7. Constitutions containing only incidental references to justices of the peace:

Maine: Art. VI, Sec. 5, establishes seven-year term.

may not include justices of the peace, and to add at the end of the list the words "Such other inferior courts as the legislature may establish," thereby raising difficult questions as to the relation between justices of the peace and other courts established by law.

The trial courts other than justices of the peace, which are designated in the state constitutions as recipients of judicial power, usually include courts of general jurisdiction, such as circuit, district or superior courts. An adequate system of minor courts would be likely to exercise a jurisdiction which would more or less overlap that of such constitutional courts. If the jurisdiction of those courts were declared by the constitution to be exclusive, the scope of the powers available for a minor court system would obviously be limited thereby, but if not exclusive, such jurisdiction would constitute no restrictions upon the powers which might be granted to minor courts. The question would be a local one in each state, depending on the provisions of the constitution. In most states, however, the grant of power to courts having a general jurisdiction is not exclusive, and a portion of it may be exercised concurrently by minor courts if the legislature so determines.

A few constitutions specifically include certain additional courts of limited jurisdiction, other than justices of the peace, among those in which judicial power is expressly vested, such, as county courts, municipal courts, and courts of certain designated counties. These would of course present local problems in connection with the reorganization of a minor court system. Probate or orphans' courts are also frequently found among those named in the constitution as recipients of judicial power. This jurisdiction, however, is so far outside the field in which minor courts would ordinarily operate, that it presents no serious problem in connection with the establishment of a minor court system.

It is quite clear from the foregoing that there is no uniform pattern which can be followed in detail as a means of avoiding constitutional obstacles standing in the way of modernizing courts of minor jurisdiction. The situation in each state differs more or less from that in other states, in consequence of which the possibilities of reform within the framework of a constitution, as well as the particular changes required in that framework itself, involves questions of local constitutional language and its interpretation.

The most common form of state constitution is one providing that the judicial power of the state shall be vested in certain named courts and in such other courts, or such inferior courts, or such courts inferior to the supreme court, as shall be established by law. Under such constitutional provisions there is ample power in the legislature to create whatever minor courts would best meet the needs of the state.

A few states, however, have a different form of constitution, containing restrictions upon the types of minor courts which the legislature is authorized to establish, such courts being sometimes limited to municipal courts, or courts to be established for incorporated cities or towns or villages.

The supreme court is the only court which under our constitutional system, should necessarily be placed in a position entirely independent of the legislature. The others are agencies which should be subject to adjustment and change from time to time, in respect to their organization, location and jurisdiction, as the conditions of our society change. The entire court system, below the supreme court, should therefore consist of such courts as the legislature may establish to meet the needs of the state. Article 10 of the constitution of Rhode Island seems to contain the simplest and most practicable provision for a judicial system to be found in any of our states. It reads as follows:

"Section 1. The judicial power of this state shall be vested in one supreme court and in such inferior courts as the general assembly may, from time to time, ordain and establish.

"Section 2. The several courts shall have such jurisdiction as may from time to time be prescribed by law."

That would seem to be an ideal article for any state constitution.

Massachusetts: Ch. 3, Art. 3, seven-year term.

Vermont: Ch. I, Sec. 28, "The justices of the supreme court shall be justices of the peace throughout the state."

Editor's Note: The foregoing notes have been compiled by the editor from a six-page digest of the constitutional provisions of all states relating to justices of the peace and minor courts included as part of the text of the article as published in the Judicial Council Report. Copies of this are available upon request addressed to the Judicial Council or to the American Judicature Society.

Shall Federal Diversity of Citizenship Jurisdiction Be Abolished or Modified?

The proposal to abolish diversity of citizenship as a basis for federal court jurisdiction, as embodied in H. R. 4168, introduced in Congress a little over a year ago, was the subject at that time of a poll of the directors and officers of the American Judicature Society. The result, as reported to the House Judiciary Committee, was 31 opposed, 26 in favor, 6 noncommittal, and 42 not voting. A well-written and convincing argument by Judge Denman of the Tenth Circuit was adopted as their own by many of those favoring the proposal, but most of those opposed to it, as well as a number of others, took the time and effort to submit comments, explanations and arguments of varying length in support of their position. These were not then printed in the JOURNAL because of their large volume, which would have more than filled an entire issue, but they were separately lithoprinted and distributed to many interested parties.

In view of the fact that the same bill will be considered by the 1947 Congress, it has been suggested that the replies and comments received in that poll would be worth publishing at this time, and excerpts from them, representing each view, follow. There is still a supply of copies of the full text of all the replies, available to any person without charge upon request.

The bill in question (H. R. 4168, S. 466) proposes to amend Section 24 of the Judicial Code as amended (U. S. C. title 28, Sec. 41, par. (1)), by striking out the words: "Is between citizens of different states, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or (c)." Section 2 excepts pending suits from the new rule. An amendment suggested by Senator McKellar would preserve the right of removal to a plaintiff "when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court." A proposal advanced a few years ago by Former Attorney-General William D. Mitchell would make a corporation a citizen of every state "wherein it carries on business" for purposes of federal court jurisdiction.

It is my opinion that the bill should pass. In the first place, the federal courts at least in our territory are literally cluttered up with cases that are exclusively of federal jurisdiction. They have no time to give to litigation that comes before them on highly technical grounds. In the second place, there is no reason why more than one jurisdiction should entertain the same type of litigation within the same territorial limits. I recognize that we now have in every jurisdiction numerous courts that from time to time entertain the same type of litigation and may not always decide it in the same manner; however, they are all subject to review by the upper courts of the state in which they sit, and that tends to uniformity. Nevertheless, there is no reason why rights arising under the laws of a state should be applied by two independent jurisdictions in the same territory, particularly when the appeals if taken will go to different tribunals and not be concentrated in the highest court of the state. It is true under *Erie v. Tompkins* that federal courts are required to conform to state decisions on local questions, but after all the highest court of the state, presumably the one which announced the state law, has no control over the federal court and no power to review its decisions. So I think that so far as possible decisions of rights resting upon state laws should be in the state courts.—*L. L. Bomberger, Hammond, Ind.*

In my opinion it is a good bill, and there is no present reason for jurisdiction in the federal courts of cases merely on the ground of diversity of citizenship. In jury cases, the jurors in the federal court are drawn from the state, and there is no reason to believe that they would have any different attitude sitting in the

federal court from what they have in the state court. Certainly, under present rules as to the application of state laws, there would be no more likelihood of a federal judge taking a different position on that law from what a state judge would.—*Chief Justice Charles Loring, Supreme Court of Minnesota.*

In my experience I think the greatest hardship from removals into the federal courts came from the inability of many litigants to bear the expenses of prosecuting their suits at distant points. I have known many cases that were abandoned without prosecution upon their removal to the United States courts. I am not persuaded that there is any necessity for removal on account of prejudice. This is taken care of in the state courts by change of venue unless there should be a public policy to deny non-residents equality, and in such cases there would be a denial of the equal protection of the laws.—*Harold A. Ritz, Charleston, W. Va.*

In view of the decision of the Supreme Court in the Erie Railroad case, the federal courts now have to guess too much about local law in cases where the particular point has not been settled by the state courts. I just had such a case recently in which our circuit court of appeals decided a point adversely to me based upon Florida law in connection with a trust deed and a will. The court of appeals held the trust deed void for undue influence, but held that the lower court had no jurisdiction with reference to the will. We came back, proceeded to probate the will in the state court, and with the same issues involved that state court held with me. In my opinion the circuit court of appeals misapprehended the effect of the Florida decisions.

It would probably be very awkward for the circuit courts of appeals to certify questions of law to the respective state supreme courts. If that cannot be done, then I think it probably would be better to eliminate jurisdiction in the federal courts based on diversity of citizenship when the federal courts have to guess about state law. If such cases were in the state courts and the law was in doubt, the state courts could settle the law, but the federal courts cannot do that.—*William H. Rogers, Jacksonville, Fla.*

The Vermont courts are well qualified to try cases involving state laws between citizens of one state and those of other states. The Vermont state courts, like the United States district courts, require the unanimous vote of all the jurors for a verdict. However, the expense of appeal to our supreme court is only a fraction of the cost of appeal from the United States district court to the circuit court of appeals. Poor litigants cannot afford to acquire the record necessary on appeal from the United States district courts. This one fact in my opinion justifies the enactment of H. R. 4168.—*Judge Lawrence C. Jones, Rutland, Vt.*

The longer I live the more convinced I am that the most constant factor in world history is human nature, and I think human nature is pretty much now what it was when the diversity of citizenship clause first conferred jurisdiction on the federal courts.—*Stuart B. Campbell, Wytheville, Va.*

If the propsal is made on the assumption that citizens of foreign states can now obtain fair and impartial treatment in all state courts, it would seem to be ill founded. My personal experience convinces me that in many places in the country frequently citizens of other states, particularly corporations, are at a distinct disadvantage because of local prejudices. If it is the purpose to relieve federal courts of an excessive amount of work, then the proposal is made only with the view of the situation of some courts, such as those of New York. The opinion has been expressed by a United States district judge in Missouri that the adoption of H. R. 4168 would relieve the court in his district of such a high percentage of the cases now coming before it that the court would not have a sufficient amount of work for its present personnel. It may well be that some change could be made in the present law which would eliminate the invoking of the jurisdiction of the federal courts solely on the basis of diversity of citizenship in cases where the parties could expect to receive fair and impartial treatment in the state courts. However, in my judgment the proposed amendment would result in far greater inequities than can now be charged against the existing jurisdictional provision.—*Ronald J. Foulis, St. Louis, Mo.*

If there is no danger of bias, the citizen of another state will have no temptation to sue in a federal court or to remove a case to it.—*Benjamin Wham, Chicago.*

It seems to me that the bill is more drastic than required to remedy the supposed evil. I am not impressed with the argument that the proposal will lighten the federal dockets. These cases must all be tried somewhere, and insofar as their trial by state courts will lighten the federal dockets, it will add to the burden of the state courts. It would require a nice appraisal of their relative burdens to make this consideration an argument for the bill. If injustice to poor and individual plantiffs is being caused because foreign corporate defendants are able to drag them into a more expensive forum in the federal courts, it would be simple to deny the jurisdiction to defendant corporations which, although incorporated outside the state, nevertheless have places of business within the state or are admitted to do business therein. On the whole, I am not convinced that cases do not occur in which the foreign defendant deserves a fairer forum than a jury in the local state court. In some districts at least the federal juries are of a higher quality than the state jury, and coming from over a wider area they are less liable to be affected by local prejudices in favor of the plaintiff.—*Conrad E. Snow, Rochester, New Hampshire.*

I do not favor the complete elimination of diversity of citizenship as a basis for federal district court jurisdiction, but believe that a restriction thereof is warranted and desirable. I do not believe that it is feasible to predicate possible jurisdiction on prejudice or local influence. Speaking generally, it seems to me that where a non-resident individual or a foreign corporation in a state does business out of which a cause of action arises, the action should not be justiciable in a federal court if service of process can be made on the defendant in that state. Example: A citizen of Ohio or an Ohio corporation operates a retail store in Michigan. A customer is injured therein through the negligence of the store owner. Action in federal court or removal thereto should not be permissible if service on the defendant can be obtained in Michigan. The problem of properly wording such a provision is not so simple as the foregoing appears to suggest. The dominant idea back of the view expressed herein is that when others go into a state and conduct a business therein and in the prosecution of that business a cause of action arises in that state, the resultant action should be determined by the courts of the state, if possible, and there is no justification for giving either party the additional choice of a federal forum. This is also applicable to c o n t r a c t actions.—*George E. Brand, Detroit.*

There are few if any of the states, and certainly Connecticut is not one of them, which have the liberality afforded us by the federal rules. This is my principal reason for opposing this legislation,—*J. F. Berry, Hartford, Conn.*

Since the obvious purpose of the constitutional provision and the ensuing legislation was to provide a tribunal less subject to the local prejudices against an outside citizen, it is unfortunate that the reasons advanced in support of this new measure are themselves fairly dripping with local prejudice. The argument seems to be that since these foreign corporations are in ill repute anyway, it serves them no more than right that they should be compelled to litigate their defenses before the local courts and juries no matter how prejudiced they may be. It reminds one of the old story of the prospective juror who said he had no prejudice whatever against the accused and could grant him as fair a trial as the old reprobate deserved.—*W. G. McLaren, Seattle.*

The problem involved seems to be that of balancing possible or probable *inconvenience* to plaintiffs against possible or probable *injustice* to defendants. Inconvenience to plaintiffs is assumed from the fact that there are only a few places in a state at which federal cases may be tried, whereas state cases may be tried in any county. Before any general conclusion can be drawn it is necessary to take into account the venue statutes of the several states. In general these statutes are more favorable to defendants than they are to plaintiffs except when a foreign defendant is concerned. Attempts on the part of state legislatures to favor state plaintiffs as against foreign defendants in the venue statutes have raised serious constitutional questions. The tendency has been to favor the state plaintiff to the extent possible under the constitution. One way of nullifying this discrimination is to permit removal to a federal district court.

In cases tried without a jury there is little basis for suggesting that a state court having jurisdiction of claims involving more than $3,000 will be biased in favor of state plaintiffs against non-state defendants. On the other hand, in cases tried before juries, there is basis for suggesting that out-of-state defendants, especially foreign corporations, do not get as fair treatment in state courts as they do in federal courts. One basis for this suggestion is the opinion commonly held that federal jurors compared with state jurors are in general less likely to be governed by sympathy and prejudice. One reason for this opinion is the fact that state jurors are selected from one county while federal jurors are selected from a much larger area. Another reason is the belief that federal jurors are on the whole better qualified than state jurors due to superior methods of selection, which, however, is open to dispute. Another basis for the above suggestion is the fact that attorneys for state plaintiffs are usually anxious to try jury cases against out-of-state defendants before state juries. When an attorney has a case which will appeal to the sympathy of a local jury, it is easy to understand why he should prefer not to go into a federal court where he must persuade *all* the jurors that his claim is just, and must do so in the presence of a judge who may advise the jurors on the facts.

In this period of reconversion nothing should be done which will restrict business to certain areas of the country. If diversity jurisdiction is abolished, corporations and others may fear to do business in certain states because of the reputation of local juries. Fears, regardless of whether they are well founded, retard investments.

In view of the fact that trial by state *juries* offers the only real danger to out-of-state defendants, a possible solution of the problem is to provide that only those diversity cases which are triable by jury may be removed. In any case the state plaintiff could defeat removal by waiving jury trial. There being already a widespread practice of trying civil actions without a jury, the cases which would be affected would be, in the main, those appealing to the sympathy or prejudice of a local jury.—*Excerpts from a memorandum by Professor W. W. Blume, University of Michigan law school, prepared at the request of Dean E. Blythe Stason.*

One of the obligations of a sovereign power is to see that its citizens or subjects are justly treated by other governments, their citizens and subjects; and no small part of the business of the state department of any nation consists in negotiation with other nations as to claims of its nationals. Our federal constitution forbids negotiations of this sort between the several states of the Union. In lieu of the exercise of such power by the states, the federal courts are set up under the government to which the citizens of all states owe allegiance, to afford impartial tribunals for the settlement of disputes between citizens of different states. The state courts cannot properly perform this function because they are set up by and responsible to the people of the states which create them. Citizenship in the United States is both local and national. For matters involving the local citizenship the local courts are provided. For matters which involve citizens of different states, only the federal courts can furnish to both a tribunal of the sovereignty to which both owe allegiance and to which both look for protection.—*Judge John J. Parker, Fourth Circuit Court of Appeals.*

I am convinced that the federal courts during the past few years have been setting a helpful pattern in simplified procedure, expeditious functioning, and official consciousness, that has been having a reflective effect in many of our state court systems. Diversity of citizenship cases, I think, have supplied the principal conduit for this professional comparison and appraisal. The percolation and absorption are far from complete, and, in the interest of judicial administration generally, I should very much regret if this connecting line between the two systems could not be kept open a while longer.

Many of the traditional arguments against diversity jurisdiction no longer have their former force. *Erie R. R. v. Tompkins* has eliminated the possibility of any difference in legal standards by which the results in such cases are determined. The cost of litigation in the federal trial courts has been materially cheapened, and pre-trial practice and the direct discovery and admission facilities of the new federal rules have made unnecessary much of the previous

preparational expense. The recent court reporter act has made unnecessary the special hiring of such reporter.

The responsible probing and resolving of questions of state law, in which the federal courts have been obliged to engage since *Erie R. R. v. Tompkins*, are slowly but inevitably, I think, tending toward a more careful clarification by the state courts in their subsequent decisions of some of their previous loose expressions and of some of their irreconcilable opinions that they have heretofore written which have completely ignored each other. I could point to a number of specific instances in recent state court decisions where I have seen these tangible results follow.—*Judge Harvey M. Johnsen, Eighth Circuit Court of Appeals.*

A Plan for Law Student Participation in Real Cases

SCOTT P. CRAMPTON

On various occasions criticism has been made of our law schools in that their graduates lack the practical training to enable them at the outset to engage for themselves in the practice of law.[1] Without debating the merits of the issue, the following procedure is suggested with the thought that it may help to bridge the present gap between school and practice and still dovetail into the usual case book approach of the law schools.

There are undoubtedly in most cities a number of attorneys who will from time to time be taking cases to appellate courts and in connection with which they will have either printed records or carbon copies of the papers which are filed in the reviewing court. In the same cities there are quite likely to be senior students in law schools who would welcome an opportunity to work on a real honest-to-goodness case. It would seem that the two groups could well be brought together to their mutual advantage and that this could be done through the local bar association or through an office of the law school.[2]

When such an intermediary had been provided, it would make up a list of law students interested in this "extramural" activity. Then when a practicing lawyer (who was interested in this program) had a case on appeal, he would call the intermediary organization, and a law student would be assigned to the attorney's case.[3]

In practice the plan should be made to work by taking a minimum of the attorney's time. Thus, at the convenience of the attorney, the law student would call at the attorney's office to pick up the printed record or appropriate papers which would have the points on appeal or assignments of error. The lawyer might well take ten or fifteen minutes of his time giving the law student a summary of his intended approach on the appeal and at the same time setting a fixed date for the student to prepare and mail to him a brief in the case. It would then be the task of the student to take the record and do what he could toward writing a complete appellate brief including, of course, citations of authorities to support the argument made under the various assignments of error.

It should be understood that the student would not call at the attorney's office after the initial visit unless invited to do so, and it should probably be understood also that the lawyer would not impose on the student either by limiting his time unduly or by asking for citations on various points. In fact the brief should be a clinical experiment for the student, and he should be given a free hand in developing the propositions of law presented in the appeal. Since, however, the attorney must meet a deadline in filing his brief, the student

1. Westwood, "The Law Review Should Become the Law School," 31 Va. L. Rev. 913 (1945); Frank, "Why Not a Clinical Lawyer-School?" 81 U. of Pa. L. Rev. 907 (19); Souter, "Internship for Lawyers," 29 J. Am. Jud. Soc. 186 (1946); cf. Simpson, "Continuing Education of the Bar," 59 Harv. L. Rev. 694 (1946).

2. The Junior Bar Conference of the American Bar Association has local committees on the relation of the bar to law students which are active in various cities and which might sponsor this plan. The clerk of the law school moot court might also perform this service.

3. If it seemed advisable, two students could be assigned to the case so as to give them the advantage of working together.

might just as well learn to meet a filing date on his work.

In the meantime the attorney taking the appeal would naturally proceed with the preparation of his brief exactly as though no one else were working on it. It may be that when the student's brief was submitted there would be nothing in it of assistance to the attorney. If so, the attorney would have at least helped in the education of a future lawyer. On the other hand, it is quite possible that the student may have found a decision, a text book reference, or a law review article which the attorney could utilize to advantage. The student may also have developed a new analogy or a somewhat different approach to the problem which the attorney could use to improve his position.[4] If the attorney derived any assistance at all from the student's effort, the attorney will have been repaid in part, at least, for his time in discussing the case with the student.

From the student's viewpoint, he would be doing actual research work with the tools of his profession and on a case where the facts are frozen. His field would be definitely limited to the actual record, and he could not proceed with the usual assumptions or with the aid of the concocted testimony that so often accompanies the moot court cases. In all fairness the student should be given a copy of the brief filed by the attorney (and the opponent's brief if possible) so as to compare his work with the papers actually filed. It might be that the student could arrange to attend the oral argument of the case. In any event, he would be able to read the decision when it was handed down. An arrangement such as this would certainly furnish the law students with a little first hand *practical* experience. If it also helped to improve the briefs, the benefit would accrue to the lawyer, his client,[5] and the courts.

The arrangement suggested above would of course be subject to modification or changes to meet local needs and conditions, but is not the procedure worth a trial? In short, the proposal would give to lawyers a sample of what practice teaching gives to teachers and what a period of internship gives to doctors.

If a proposal such as this worked out in practice, various law schools might be induced to give credit for work done in this connection with the student submitting a carbon copy of his brief as a part of his moot court work.

In the event that such a program is to be tried, it would seem that the next few years would be as favorable as any in which to inaugurate it. The large number of veterans now in the law schools are on the average several years older and more mature in their thinking than were the law school students before the war. Certainly, these men on the whole should be able to make a contribution to the briefs to be filed in current litigation. It is believed that they would welcome a chance to do so.

Oklahoma Bar Orders Study of Non-Partisan Court Plan on Local Option Basis

The Oklahoma Bar Association's Committee for the Improvement of the Administration of Justice received a partial setback in its campaign for judicial selection improvement in that state when the Association's House of Delegates voted at the recent annual meeting to table the committee's recommendations that the Association approve the principle of non-partisan selection of judges, authorize the drafting of a plan, and put in motion an educational program looking toward its adoption in Oklahoma. The tentative plan advanced by the committee was very similar to the Missouri plan, whereunder judicial vacancies are filled by appointment of the governor from a list of nominations submitted by a nominating commission, subject to subsequent approval of the voters on a ballot without opposing candidates limited to the sole question of his retention in office.

The vote to table carried by 40 to 31. It came at an unfortunate time, with nearly half of the members absent, including many supporters of the plan. However, the House did immediately thereafter unanimously authorize consideration of a similar constitutional amendment applicable at once to the two large cities and elsewhere by local option. This, too, follows the Missouri plan, which probably would not have been adopted without the local option

4. There is sometimes an advantage to be gained from a fresh approach to a problem—and it is often no disadvantage that the approach is not definitely channelized in the legal way of thinking.

5. The client should have no objection to the plan, since all the papers and information given the law student had previously been disclosed in the trial court proceeding.

feature, and there is reason to hope that an Oklahoma plan similarly drafted may yet meet with success.

Bar Associations on the March

A glowing picture of the present and future of organized bar activity was painted by George Maurice Morris of Washington, D. C., former president of the American Bar Association, in an address before the recent annual meeting of the Ohio State Bar Association at Columbus.

Mr. Morris traced the development of the American Bar Association as an active, representative organization from the time, about fifteen years ago, when a chairman of a House committee expressed doubt as to the sincerity of A. B. A. recommendations, up to the past year when the same chairman expressed the highest confidence in the same organization and its recommendations to Congress. He pointed to significant achievements of the state bar organizations of Ohio, Michigan, Kentucky and other states, referred to the work of the Inter-American Bar Association and the prospective organization of a world bar association early in 1947, and concluded:

"The day was when the practical-minded legislator, the administrator zealous for greater authority and the public itself could ignore the bar association committees. They could be dismissed as pleaders for special interests with a few 'do-gooders' sprinkled in for seasoning. That treatment no longer goes. Such committees with increasing regularity present the opinions of men who are expert in the fields in which they speak. Their recommendations have the endorsement of the chosen representatives of the bar as a whole, made up, as it is, of men of all shades of political and social views. Tomorrow, the organized lawyers of the world will be heard in the councils of the nations."

Integration of Montana Bar Again Thwarted

The decision of the Supreme Court of Wisconsin declining to integrate the bar of that state preceded by only a few days a similar decision of the Supreme Court of Montana handed down January 4, 1947. The full text of the 115-word opinion will take but a few lines:

"The petition for organization of the bar of this state by court rule was orally argued by counsel favoring the application and by others in opposition thereto. After duly considering the petition, some members of this court entertain the opinion that the integration or unification of the attorneys-at-law of the state into a compulsory, all-inclusive organization must come through legislative and not through judicial action, while other members hold to the view that, assuming authority in this court to provide for integration or unification of the bar, the existing situation does not require or justify the creation of a compulsory and all-inclusive association as petitioned for. The petition is accordingly denied."

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